UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CARL M. BROWN,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 90-0007 P***
	)	
THE GOVERNOR BAXTER SCHOOL FOR THE DEAF,	)	
	)	
	)	
Defendant	)	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT [1]

The Governor Baxter School for the Deaf (``School''), adjudged by a jury on July 23, 1991 to have willfully violated the plaintiff's rights under the Age Discrimination in Employment Act (``ADEA''), 29 U.S.C. '' 621-34, moves for judgment notwithstanding the verdict (``JNOV'') pursuant to Fed. R. Civ. P. 50(b)[2] or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59(a). After carefully reviewing the parties' legal memoranda and applicable law, I grant the defendant's motion for JNOV.

A motion for JNOV should be granted only if, in viewing the evidence and inferences therefrom in the light most favorable to the non-moving party, a reasonable jury could only conclude

[1] Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

[2] The defendant moved at trial for a directed verdict, as required by Fed. R. Civ. P. 50(b) to preserve a motion for JNOV.

that the moving party was entitled to judgment. *See, e.g., Raymond v. Raymond Corp.*, No. 91-1110, slip op. at 5 (1st Cir. July 29, 1991). The court should not itself weigh or assess the credibility of the evidence in making this determination. *Id.* Viewing the evidence in the light most favorable to the plaintiff in the instant case, I am constrained to find that a reasonable jury could only have returned a verdict in the defendant's favor.

An age-discrimination plaintiff initially must present a *prima facie* case predicated upon three showings: (1) membership in the protected group; (2) performance of his or her job ``at a level that met his [or her] employer's legitimate expectation;" and (3) replacement by ``someone with roughly similar qualifications." *Connell v. Bank of Boston*, 924 F.2d 1169, 1172 (1st Cir.), *cert. denied*, 111 S. Ct. 2828 (1991) (citations omitted). Brown made out such a *prima facie* case. He was 71 at the time he left the School. He is a licensed boiler operator, his performance evaluations generally were favorable and he denied at trial that he ever had slept on the job. Finally, although the plaintiff opaquely made out his case as to his replacement, one reasonably could have inferred that he was replaced with someone of similar qualifications. Brown having made out this case, the burden of production shifted to the School to articulate nondiscriminatory reason(s) for the plaintiff's coerced retirement[3], thereby nullifying the inference of discrimination. *Id.* The School did so at trial,

[3] Brown presented no direct evidence that the School coerced his retirement. However, the jury reasonably could have inferred that the School did so based on testimony that (1) the School essentially considered Brown a troublemaker, (2) the School was thinking of firing Brown at the time of the negotiations leading to his retirement, and (3) Brown's union representative, Ronald Ahlquist, conferred with state official Alan R. York out of Brown's presence and embodied some of the School's requests in the retirement agreement. A jury likewise reasonably could have concluded that Brown's agreement to retire was not knowing and voluntary and therefore was not a bar to this lawsuit. *See, e.g., Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 110 S. Ct. 292 (1989) (enumerating factors considered in determining whether plaintiff waived right to bring suit under ADEA).

introducing ample evidence that Brown, who worked at the School for 10 years, was not only generally disagreeable but also insubordinate to his final supervisor, Lou Osier. The School also presented evidence that Brown had been caught asleep on the job during an emergency -- the alleged incident that precipitated negotiations culminating in Brown's retirement. The School having effectively rebutted the inference of discrimination, Brown bore the final burden of proving that the School's stated reasons not only were ```obviously weak or implausible'" but also pretextual for age discrimination. *Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir. 1991) (citations omitted). The evidence, taken in the light most favorable to Brown, persuades me that he failed to do so. Brown denied that he had fallen asleep on the job; he also adduced evidence from which the jury reasonably could have inferred that many of the problems for which he was cited, such as misplacing soap and teacans, were trivial enough to be pretextual for some deeper animus (not necessarily age animus). However, Brown's own testimony corroborated the School's statement that Brown got along badly with Osier. Further, Brown failed to produce a scintilla of evidence from which a reasonable jury could have inferred that age discrimination in fact motivated the School to ease Brown out. While proof of age discrimination often is indirect, inference of its existence must be drawn from evidence -- for example, a supervisor's comments[4] or statistical data[5] -- not made up of whole cloth. *See, e.g., Connell*, 924 F.2d 1172 n.3 (``the evidence as a whole, whether direct or indirect, must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus."); *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1341 (1st Cir. 1988) (``ADEA does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the

[4] *See, e.g., Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989) (discussing significance of age-related remarks in ADEA case).

[5] *See, e.g., Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1342 (1st Cir. 1988) (discussing use of statistical data in ADEA case).

decision to fire does not stem from the person's age.") Brown's subjective assertion that the School was motivated by age discrimination, without more, did not suffice to provide such evidence. *See, e.g., Connell*, 924 F.2d at 1175; *Carter v. City of Miami*, 870 F.2d 578, 585 (11th Cir. 1989). The jury was entitled to credit Brown's testimony that he did not fall asleep on the job. However, the only reasonable conclusion it could have drawn from the testimony as a whole was that the School ousted Brown because it considered him a troublemaker --a motivation that is neither synonymous with, nor evidence of, age discrimination.[6] *See, e.g., Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 657 (7th Cir. 1991); *Carter*, 870 F.2d at 584-85; *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521-23 (6th Cir.), *reh'g denied*, 797 F.2d 342 (6th Cir. 1986).

For the foregoing reasons, the defendant's motion for JNOV is hereby ***GRANTED***.

Dated at Portland, Maine this 15th day of August, 1991.

David M. Cohen
United States Magistrate Judge

[6] Because a reasonable jury could not have concluded the School discriminated against Brown on the basis of age, it could not have determined that the School did so willfully. Brown's case therefore falters on a second ground -- failure to meet the applicable two-year statute of limitations, extended to three years only if a plaintiff demonstrates willful age discrimination. 29 U.S.C. '' 626(e); 255(a).